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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 966

THE DELANO-EARLIMART IRRIGATIO.' DISTRICT, *et al.*,
Petitioners,

vs.

EVERETT G. RANK, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.
OPINIONS BELOW.

The opinions below are correctly set forth in petitioners' Petition for Writ of Certiorari.

II.
THE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS.

1. Acts of Congress.

(a) Act of December 5, 1924 (43 Stat. 672, 702; Sec. 4, Subs. B)

(b) Act of June 17, 1902 (32 Stat. 388; 43 U. S. C. 391 *et seq.*)

(c) Act of August 26, 1937 (50 Stat. 844)

(d) Reauthorization Act of October 13, 1949 (63 Stat. 852, 853)

(e) Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208, Subs. (a))

(f) Federal Rules of Civil Procedure (28 U. S. C.) Rule 75(d)

(g) Federal Rules of Civil Procedure (28 U. S. C.) Rule 75(i)

(h) 28 U. S. C. 1254(1)

(i) 28 U. S. C. 1442(a)(3)

2. Federal Regulations.

(a) Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935. (Issued in accordance with the Act of December 5, 1924 (43 Stat. 672, 702, Section 4, Subsection B))

3. State of California Constitution and Statutes.

(a) California Constitution, Article XIV, Sec. 3.

(b) California Water Code Sections: 104, 106, 1254, 1460, 10500, 10504, 10505, 11128, 11460, 11463.

III.
STATEMENT OF THE CASE.

This case involves the United States Bureau of Reclamation's Central Valley Project in California.

1. History of Present Litigation.

This action involves the efforts of the City of Fresno, California, Tranquillity Irrigation District, and a group of farmers owning riparian and percolating water rights along a thirty-eight mile stretch of the San Joaquin River between Friant Dam and Gravelly Ford Canal in Fresno and Madera Counties, California, to obtain the water to which they are entitled out of the United States Bureau of Reclamation's Central Valley Project in California.

Among other defendants in the District Court were the United States, the defendant Bureau of Reclamation officials and some fifteen irrigation districts supplied with San Joaquin River water out of the Central Valley Project.

The District Court granted the farmers an injunctive judgment by decreeing what is known in California as a "physical solution". This decree of physical solution ordered the appellant Bureau of Reclamation officials either to allow the full natural flow of the San Joaquin River below Friant Dam or in the alternative, to reduce the flow to a minimum and to supply the farmers riparian and percolating water rights by construction of ten check dams in this thirty-eight mile stretch of the San Joaquin River in order to pond the water in the river and give the farmers a substitute riparian and percolating water supply in place of what they had before the appellant Bureau of Rec-

lamation diverted most of the natural flow of the San Joaquin River from their lands by means of Friant Dam and the Madera and Friant-Kern Canals of the Central Valley Project. The Court below sustained the District Court's plan of physical solution and held that these riparian and underground percolating water rights of these farmers had not been taken by eminent domain.

The lands of the respondent City of Fresno and the lands of the respondent farmers are in the county and watershed of the San Joaquin River. The City of Fresno obtains its water supply partly from wells pumping from underground percolating waters seeping from the San Joaquin River below Friant Dam. The respondent farmers obtained their water both by pumping directly from the San Joaquin River and by pumping from percolating water stratas supplied by percolation from the San Joaquin River.

The District Court decreed that the City of Fresno had overlying percolating water rights to water seeping from the San Joaquin River. The District Court also held that the City needed and was entitled to a supplemental supply of surface water out of the Bureau of Reclamation's Central Valley Project at a rate not to exceed $3.50 per acre-foot and that the appellant Bureau of Reclamation officials' charge of $10.00 per acre-foot for water out of the Central Valley Project was unreasonable.

The Court below sustained the District Court's finding that the City of Fresno had underground percolating water rights but ruled that these rights of the City of Fresno *could* be taken but *had not* been taken by the appellant Bureau of Reclamation officials by eminent

domain or condemnation. The Court below also reversed the District Court's ruling that the City of Fresno was entitled to a supplemental supply of water out of the Central Valley Project at not to exceed $3.50 per acre-foot, holding that the determination of whether the City of Fresno was in the service area of the Central Valley Project as provided by Congress was an *administrative and not a judicial decision* and that the determination of whether a rate for water in excess of $3.50 per acre-foot was reasonable or unreasonable was also an administrative and not a judicial decision and that the fixing of rates for water out of the Central Valley Project was beyond the power of the Courts to control. The Court below also dismissed the suit as against the United States but sustained the action against the appellant Bureau of Reclamation officials.

The appellant Bureau of Reclamation officials and the City of Fresno have already filed petitions for Writs of Certiorari with this Court to review the decision of the Court below. (No. 366 and No. 606, October Term, 1961.) Both of these Writs have been granted. The Court below granted the State of California and petitioning districts a rehearing and on said rehearing dissolved the injunction against the petitioning districts but did not dismiss them from the case. The petitioning districts filed their Petition For Writ of Certiorari. The State of California has filed no Petition for Writ of Certiorari.

2. The Central Valley Project.

The Bureau of Reclamation's Central Valley Project in California has been described in the decisions of this Court in *United States v. Gerlach Live Stock Co.*,

339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950) and in *Ivanhoe Irrigation Dist. v. McCracken*, 357 U. S. 275, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 (1958). It is also described in *Rank v. (Krug) United States*, 142 Fed. Supp. 1, and in *Rank v. Krug*, 90 Fed. Supp. 773 (1950) which latter case is cited with approval by this Court in *United States v. Gerlach Live Stock Co., supra.*

As this Court stated in its two opinions, *supra*, the Central Valley of California is a valley 400 miles long and 100 miles wide. The northern portion of the valley has an excess of rainfall and is drained by the Sacramento River. The Southern portion of the valley which includes the City and County of Fresno and the lands of respondent farmers, is arid, lacks water and is drained by the San Joaquin River. As stated by this Court, the Central Valley Project "is a gigantic undertaking to *redistribute* principal fresh water resources of California."

The Central Valley Project has several added incidental features such as Folsom Dam on the American River and Trinity Dam on the Trinity River of California. However, briefly stated the primary purpose of the Central Valley Project as authorized by Congress was, and still is, to take water from the water-rich northern part of the Central Valley of California and redistribute it to existing municipalities and counties in the southern portion of the Central Valley, including the City of Fresno and the following six counties: Merced County, Madera County, *Fresno County*, Tulare County, Kings County and Kern County.

3. Legislative History of the Central Valley Project.

Section 4 of the Act of Congress of December 5, 1924 (43 Stat. 672, 702, Sec. 4, Subsec. B), provides that no irrigation project should be constructed under the Basic Reclamation Act of June 17, 1902 (32 Stat. 388 as amended) (43 U. S. C. 391) until the reclamation project had been set forth in detail.

> "That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes and that it will probably return the cost thereof to the United States."
>
> Act of December 5, 1924 (43 Stat. 672, 702, Sec. 4, Subs. B).

Pursuant to said Act of December 5, 1924, hereinabove referred to, Secretary Ickes submitted to President Roosevent the Feasibility Report on the Central Valley Project and on December 2, 1935, President Roosevelt officially approved the same, thereby determining the basic features of the Central Valley Project.

That the Feasibility Report by the President dated December 2, 1935, is the basis and continued to be the basis of the Central Valley Project as authorized and reauthorized by Congress, appears from the decision of this Court in *United States v. Gerlach Live Stock Co., supra.*

The Feasibility Report specifically provided that the water from Friant Dam, one of the principal features of the Central Valley Project, was to serve "*developed,* irrigated lands" in the counties of Merced, Madera, *Fresno,* Tulare, Kings and Kern, including the City of Fresno.

The Feasibility Report also specifically provided that the Central Valley Project was to furnish a supplemental water supply for "*existing municipal* developments" which, of course, would include the petitioner, the City of Fresno.

And finally, and what is most important, the Feasibility Report provided that *the Central Valley Project was not designed to bring new lands into cultivation.*

> "*The project is not designed for bringing new lands into cultivation,* but for the maintenance of existing agricultural development and existing civilization of high type." (Emphasis ours.)
>
> Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935.

After the determination of the limits of Central Valley Project on December 2, 1935, by President Roosevelt, Congress as stated thereafter specifically provided that the Central Valley Project should be *constructed and operated* in accordance with the Basic Reclamation Law of June 17, 1902 (originally signed by President Theodore "Teddy" Roosevelt) (43 U. S. C. 391, 411), which act specifically provides that in the construction and operation by the Bureau of Reclamation, *all* state laws on waters must be obeyed and all existing *water rights must be respected* and protected by the government officials.

California law specifically provides *that the State of California* shall determine what water of the state can be converted to public use and that domestic use of water is the highest use of water in the state. California Water Code Sections 104, 106 and 1254.

California law also specifically provides that no water should be taken from the county and watershed where such water originates until the needs of such county and watershed of origin have been fully supplied, (California Water Code Section 11460) and that these limitations shall apply to the Federal Government in its operation of the Central Valley Project, (California Water Code Section 11128) and finally Congress itself specifically provided that in the operation of the Central Valley Project that the Bureau of Reclamation should recognize and follow all California county of origin and watershed of origin laws not only for their present but for the future needs of said watersheds of origin and counties of origin.

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *.
>
> "* * * the Secretary of the Interior shall make recommendations for the *use of water in accord with State Water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.*" (Emphasis ours.)
>
> Reauthorization Act of October 13, 1949 (63 Stat. 852, 853).

Friant Dam was completed (with the exception of some drum gates not included in the original plans) and placed in actual operation on August 4, 1944. At this time water was first turned into one of the main canals for use.

The petitioning districts all voluntarily appeared in this action and contrary to the statement of petitioners in their Petition for Writ of Certiorari that they have never claimed any interest on their own behalf in any of the water rights of the respondents or in and to the waters of the Central Valley Project save as contractors under their contracts with the Bureau of Reclamation, which said contracts and the dates of the same are listed in detail in *Rank v. (Krug) United States*, 142 Fed. Supp. 1 at 137 in their answers to Plaintiffs' Complaint and Plaintiffs' Amended Complaint in the District Court and in their answers to the Complaint in Intervention of the State of California in the District Court, they actually alleged that the districts and their land owners were the *real owners* of all of the water to be developed by the Central Valley Project and partly claimed by respondents, and that the United States was merely the trustee holding such water as trustee for said petitioning districts and their land owners and that plaintiffs in the District Court had no water rights whatever. This claim to actual ownership of the waters of the Central Valley Project, by the petitioning districts in their answers is found at pages 158, 159, 170 and 172 of the record. The allegation in the answer of petitioner Southern San Joaquin Municipal Utility District does not appear in the printed record but appears in the answer of Southern San Joaquin Municipal Utility District to the State of Cali-

fornia's Amended Complaint in Intervention filed January 4, 1954. However, this allegation in Southern San Joaquin Municipal Utility District's answer to the State of California's Amended Complaint in Intervention appears in the *complete* record now before the Court in this case as explained in the paragraph following.

4. The Record in This Case.

The printed record in this case has already been filed with the Court in Case No. 366, October Term, 1961 of this Court—the Petition for Writ of Certiorari filed by the appellant Bureau of Reclamation officials. However, this does not constitute the entire official record in this case.[1]

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[1]The complete record in this case is 50,000 pages. The trial before the District Court took nineteen months of continuous trial and the decision of the District Court involves 263 separate rulings—the largest number of points ever decided in a single case according to West's Publishing Company. The parties printed the material portion of the record but not all of the record in order to economize. The trial judge was dissatisfied with the record as printed and on the 31st day of March, 1959, in accordance with Rule 75(i), Federal Rules of Civil Procedure, ordered the entire remaining unprinted record to be made a part of the record and shipped it to the Ninth Circuit Court of Appeals where it now is. The Department of Justice appealed the District Court's order but did not perfect their appeal, and therefore the District Judge's order became final. The unprinted portion of the record was generously quoted from by all parties before the Ninth Circuit. It is respectfully suggested that the entire record be shipped to this Court for the use of this Court.

IV.
ARGUMENT.

The petition of the petitioning districts for a Writ of Certiorari should be denied since the grounds set forth in their petition do not state any right to a writ of certiorari.

1. Petitioning Districts Are Not Entitled to Be Dismissed From This Action.

The petitioning districts, after demanding to be joined as defendants, were allowed to join as defendants and they filed answers *claiming to be the beneficial or real owners of the waters of the Central Valley Project.* At the trial the attorney for *each* of the petitioning districts demanded the right to *separate* cross-examination of each witness and demanded the right to put on his own witnesses, taking nearly half of the entire time of the eighteen-month trial. They demanded *affirmative relief* consisting of what is known under California law as a "physical solution" by the Court. At least fourteen months of the eighteen-month trial was devoted to arriving at a physical solution demanded by them and the other parties. The petitioning districts then appealed to the Court below and with one exception (Southern San Joaquin Municipal Utility District), did not designate any right to be dismissed from this case in their designation of points on appeal and with the one exception just noted, for the first time on their petition for rehearing in the Court below, they asked to be dismissed from this case.

In their Petition For a Writ of Certiorari to this Court the petitioning districts do not argue (with one exception, eminent domain) the main points involved

in the action but merely attempt to "incorporate by reference" the points raised by the Bureau of Reclamation officials without even itemizing them while they devote by far the greater part of their petition to their belated efforts to get out of this case. We will now point out what we think caused this erroneous contention and why they should not be dismissed from this case, and that to grant their petition would be to take the time of this Court which should be devoted to clarifying the important national issues of the right of farmers and municipalities to water under regional reclamation projects.

(a) The Statement in Petitioners' Petition for Writ of Certiorari That the Petitioners Have Never Claimed Any Interest in the Water Rights of the Respondents Is Untrue.

The inaccuracy of petitioners' statement in their Petition for Writ of Certiorari that they never claimed any title to the water rights of respondents or in and to the waters of the Central Valley Project is no doubt due to the fact that three of the attorneys filing petitioners' Petition For Writ of Certiorari at no time participated in the eighteen-month trial in the District Court, rather than due to any intended inaccuracies in their presentation.

It appears from the record that three of the attorneys appearing on petitioners' brief, viz., Messrs. Moskovitz, Peckinpah and Brett, never attended nor participated in the eighteen-month trial of the above entitled action. Mr. Reavis attended the trial for only a few weeks.

Without personal criticism of any attorney attempting to write or to file a petition for ceriorari before this Court without attending the trial of the action for which a writ is sought, and without first-hand knowledge of what transpired at the trial, it is apparent from the several misstatements in petitioners' petition that the petition filed apparently was written by one of the attorneys before mentioned who had not attended the trial and who is unfamiliar with the pleadings. The complete record in this case consists of nearly 50,000 pages which would take nearly a year to merely read, much less to brief and, really study. With this observation we will now discuss the inaccurate statements in the present Petition for Writ of Certiorari.

The statement in petitioners' brief that they have never claimed any interest in the water which respondents claim nor in and to any waters of the Central Valley Project is untrue. This incorrect assertion as heretofore stated, is probably due to the fact that the counsel who apparently wrote petitioners' brief was unfamiliar with the long drawn-out trial of the above entitled action before the District Court. The petitioning districts came into this case voluntarily and at their own request claiming the right to respondents' water and to the waters of the Central Valley Project, not only as a party to a contract between the petitioning districts and the Bureau of Reclamation, but *also as the true or beneficial owners of said waters*—alleging that the Bureau of Reclamation's only right to these

waters was as a trustee for said petitioning districts and that respondents had and do not now have any right therein.[2]

The same petitioning districts also made the same allegation in their answer to the State of California's Amended Complaint in Intervention which answer of said petitioning districts was filed December 30, 1953 and although this answer is not in the printed record it is in the official record of this case as herein explained under Chapter III, subsection 4 of this brief.

Petitioner Southern San Joaquin Municipal Utility District in its answer to the Amended Complaint in Intervention of the State of California, which said

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[2]"Allege that each and all these answering defendants are irrigation districts duly organized and existing under the laws of the State of California; that each and all these answering defendants are parties to or are in process of negotiating contracts with the United States of America for delivery of water from the San Joaquin River by means of the Friant Dam and the Friant-Kern Canal of the Central Valley Project of California; that it is the intent, purpose and effect of the operation of said Central Valley Project of California and of said contracts between these answering defendants and the United States of America *that water rights will be acquired and held by the United States for the use and benefit of these answering defendants, among other water users making use of the works of said Central Valley Project of California, and the United States holds in trust for these answering defendants, as ultimate beneficiaries thereof,* all water necessary to meet the requirements of said contracts; that all the waters of the San Joaquin River are and will be necessary to supply the reasonable needs of these answering defendants and other water users from said Central Valley Project, in the course of the operation of said Project, and that all such water will be reasonably, beneficially and necessarily used for farming purposes, domestic purposes and for livestock to drink; that attached hereto marked Exhibit "A" and by this reference made a part hereof is a statement of the maximum amounts of water to be supplied to these answering defendants in each year under said contracts; that these answering defendants were named and sued

answer of said Southern San Joaquin Municipal Utility District was filed January 4, 1954, also alleges its beneficial ownership to portions of the surplus waters of the San Joaquin River claimed by respondents under assignments of the State of California to the Bureau of Reclamation. This answer of Southern San Joaquin Municipal Utility District to the State of California's Amended Complaint in Intervention contained a claim to beneficial ownership of the waters of the Central Valley Project and to the rights claimed by respondents.

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herein under fictitious names as defendant John Doe Districts." (Emphasis ours.)

Answer of Petitioning Districts, excluding Southern San Joaquin Municipal Utility District, to Plaintiffs' Amended Complaint. R. 159.

"Allege that by virtue of the terms of said assignments the State of California has become and is the trustor or grantor of an express trust; the United States has become and is the trustee of that trust; the landowners to acquire rights to the use of water from the works of the Central Valley Project, including the landowners of defendant districts, have become and are the beneficiaries of that trust; that any and all claims or interests of the United States obtained by the 'Exchange Contract' and similar or comparable contracts, and under the assignments hereinabove referred to *are held by the United States as such trustee under said express trust and as a part of a trust fund or res for the use and benefit of the Central Valley Project and the landowners to acquire rights to the use of water from the works of said project, and in particular the landowners of defendant districts; that the State of California, as trustor or grantor and as parens patriae, is entitled to be heard, among other things, as to all matters relating to the administration and execution of said trust by said trustee and entitled to require that the trustee administer said trust according to its true intent and meaning."* (Emphasis ours.)

Answer of Petitioning Districts, excluding Southern San Joaquin Municipal Utility District, to Plaintiffs' Amended complaint. R. 171-172.

(b) Not Only Did the Petitioning Districts Claim Beneficial Ownership to the Waters of the San Joaquin River Claimed by Respondents and to the Waters of the Central Valley Project as a Whole but They Also Asked to Be Made Named Parties to the Action and Demanded That the District Court Make a Physical Solution of the Rights of All Parties and Took a Major Portion of the Time of the Trial Court in Presenting Their Case. It Is Now Too Late to Withdraw.

All of the petitioning districts not only voluntarily appeared in this action claiming beneficial ownership to the waters claimed by respondents and to the waters of the Central Valley Project as a whole, but also requested and obtained affirmative relief from the District Court in the form of a demand for a physical solution.[3, 4] It will now be shown that the petitioning districts are not entitled to a dismissal for the reasons set forth in (i) to (ix) following.

---

[3]"That the plaintiffs * * * *must admit* to a physical solution * * *." (emphasis ours).

R. page 150.

"* * * it is the *duty* of the court to determine whether there is a physical solution * * *." (emphasis ours).

R. page 149.

"Alleges that a physical solution or solutions are *possible* and *feasible* * * *." (emphasis ours).

R. page 149.

[4]"The Court: Mr. Abercrombie, I think most all of the districts have looked upon you more or less as a spokesman. What are your views on this pre-trial situation?

"Mr. Abercrombie: * * * we feel that a physical solution is more economical, more practical and, as I say, without committing ourselves to any particular solution, we think the court's inquiry should be directed to that just as Mr. Shaw says."

R. Tr. page 27, lines 7 through 26, Pre-Trial Conference 12/20/51.

(i) *It Is Too Late at This Stage of the Action for the Petitioning Districts to Ask for a Dismissal.*

"The second sentence of Rule 41 (b) provides that after the plaintiff has completed the presentation of his evidence, the defendant may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. * * * If the motion is denied, the defendant may proceed to offer evidence. *If he does proceed he waives any right to object later that his motion was erroneously denied.*" (Emphasis ours.)

Moore's Fed. Practice 5, 1041;

Century Indemnity Co. v. Nelson (C. C. A. 9th Cir., 1936), 90 F. 2d 644.

"Rule 41 (c) Dismissal of Counter Claim, Cross Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counter claim, cross claim or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, *if there is none, before the introduction of evidence at the trial or hearing.*" (Emphasis ours.)

Moore's Fed. Practice 5, 1049.

"Where a plaintiff pleads a *counter claim* in his reply, inasmuch as there is no further responsive pleading, he is *permitted to dismiss voluntarily before the introduction of evidence* at the trial or hearing." (Emphasis ours.)

Moore's Fed. Practice 5, 1050.

But he is not permitted to dismiss after issue is joined and evidence introduced by him.

> "Likewise, where a decree, whether final or interlocutory, had been made, by which the rights of a party defendant had been adjudicated, or such proceedings had been taken as entitled the defendant to a decree, the plaintiff was not allowed to dismiss his bill without consent of defendants."
>
> Cyclopedia of Federal Procedure, 29.07, p. 85;
>
> *Chicago and Alton R. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 27 L. Ed. 1081.
>
> *Garner v. Second National Bank*, 67 Fed. 833. Cert. Denied, 163 U. S. 688, 41 L. Ed. 319, 16 S. Ct. 1201;
>
> *Hershberger v. Blewett*, 55 Fed. 170.
>
> "In a suit in equity involving the title to real estate plaintiff cannot dismiss without prejudice and without consent of defendant, *on payment of costs*, even though no cross bill has been filed, after issue has been joined, and after interlocutory decrees * * * deciding the controversy have been entered * * *." (Syllabus.) (Emphasis ours.)
>
> *Hershberger v. Blewett*, 55 Fed. 170.

(ii) *Since the Petitioning Districts Did Not Set Forth That They Were Entitled to a Dismissal, (With the Exception of Southern San Joaquin Municipal Utility District) in Their Designation of Points on Appeal Before the Court Below, This Court Should Not Consider Whether Petitioning Districts Are Entitled to a Dismissal.*

Although as has been shown by setting up affirmative defenses and counter claims and by proceeding to trial and completing the trial, that *none* of the petitioning

districts can now ask a dismissal, there is still another valid legal reason why all of the petitioning districts except Southern San Joaquin Municipal Utility District, for this additional reason, are barred at this time from asking a dismissal, viz.: None of the petitioning districts except Southern San Joaquin Municipal Utility District set forth in their designation of points on appeal before the Court below that they were entitled to be dismissed from this action.[5]

Therefore none of these other petitioning districts on this petition for rehearing may ask that this action be dismissed against them.

> "* * * Rule 17 Subd. 6, of this circuit, (9th) relating to records on appeal, requires that * * * the appellant or petitioner, upon filing of the record in this court, shall file with the clerk a *concise statement of the points on which he intends to rely.* * * * The appellant filed a statement of points on appeal *but did not list any point concerning the rejection of evidence. Hence, this point need not be considered by us. Western Nat. Ins. Co. v. LeClare*, 9 Cir., 1947, 163 F. 2d 337, 340; *Bank of America Nat. Trust & Sav. Ass'n v. Commissioner*, 9 Cir., 1942, 126 F. 2d 48, 52." (Emphasis ours.)
>
> *State of Washington v. U. S.*, 214 F. 2d 33 at 44 (9th Cir. 1954).

"In addition to what has been previously stated, no concise statements of points upon which appellant intends to rely were filed below. This violates Rule

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[5]R. 2200 and R. 2204.

17. Subd. 6 of the rules of this court, 38 U. S. C. * * *."

Cakmar v. Hoy, 265 F. 2d 59 at 62 (9th Cir. 1959).

(iii) *Water Rights Are a Form of Real Property. Interference of the Same Is a Trespass. Here the Petitioning Districts Are Proper Parties in This Action and Were Properly Joined.*

In this case the petitioning districts are joint trespassers with the Bureau of Reclamation officials in interfering with the respondents' water rights. They were therefore properly joined and the action should not be dismissed as against them.

(iv) *Since Petitioning Districts Claim an Interest in the Controversy They Should Not Be Dismissed From This Action.*

"Who may be joined as Defendants. Any person may be made a defendant who has or *claims* an interest in the controversy adverse to plaintiff." (Emphasis ours.)

379 Code of Civil Procedure, California.

"It is enough if he was found acting in concert with them."

52 Am. Jur. 861.

"The official character of the officer does not justify a trespass *and all who join or participate in the trespass are jointly liable with the officer.*" (Emphasis ours.)

48 Cal. Jur. 2d 32;

Lewis v. Johns, 34 Cal. 629.

"Where * * * an agent has committed a trespass acting under authority from his principal, they may be jointly or severally sued for damages."

48 Cal. Jur. 2d 31;

Foley v. Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842.

Here these petitioning districts claimed a right to the respondents' water—that they had rights thereto as beneficiaries and were the beneficial owners of the waters of the Central Valley Project.*

Clearly, they may be joined as parties under Section 379 of the Code of Civil Procedure of the State of California, above quoted, which rules govern the federal courts.

(v) *The Petitioning Districts Promoted, Encouraged, Advised, Conspired in, Aided, Assisted and Abetted the Commission of the Trespass by the Bureau of Reclamation Officials.*

"Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of." (Syllabus.)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373.

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*"VII. Allege that by virtue of the terms of said assignments the State of California has become and is the trustor or grantor of an express trust; the United States has become and is the trustee of that trust; the landowners to acquire rights to the use of water from the works of the Central Valley Project, including the landowners of defendant districts, have become and are the beneficiaries of that trust; * * *."

Excerpt from Answer to Plaintiffs' Complaint as Amended of Defendant Districts, filed 10/16/51, R. 158.

"31. Co-trespassers—It may be stated as a general rule that all persons who command, instigate, promote, *encourage, advise, countenance, co-operate in, aid,* or *abet* the commission of a trespass, or who approve of it after it is done, if done for their benefit, are co-trespassers with the person committing the trespass and are liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves." (Emphasis ours.)

52 Am. Jur., 861.

(vi) *Since Petitioning Districts Approved the Illegal Actions of the Bureau of Reclamation Officials Which Were Done for Their Benefit, They Should Not Be Granted a Dismissal.*

"Co-trespassers * * * all persons * * * who approve of it (a trespass) if done for their benefit. * * *".

52 Am. Jur. 861.

(vii) *The Petitioning Districts Encouraged, Procured, or Incited the Acts of the Bureau of Reclamation Officials and Are Therefore Liable. The Petitioning Districts Need Not Be Present in Order to Be Liable.*

"Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of." (Syllabus.)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373.

"'* * * that liability for trespass is not dependent upon personal participation. One who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.' (*McDaniel Bros. v. Wilson, Tex. Civ. App.* 70 S. W. 2d 618, 621.)"

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373, 375.

(viii) *Even Though We Consider the Bureau of Reclamation as an Independent Contractor, Petitioning Districts Are Liable as the District Court Correctly Held.*

"'* * * that liability for trespass is not dependent upon personal participation. One who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.' (*McDaniel Bros. v. Wilson, Tex. Civ. App.,* 70 S. W. 2d 618, 621.)"

"The rule stated is applicable where the party who cut the timber is an independent contractor. (Cummer Mfg. Co. v. Copeland, Tex. Civ. App., 35 S. W. 2d 758.)" (Emphasis ours.)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373, 375.

(ix) *Even if We Consider the Bureau of Reclamation Merely as an Agent of the Petitioning Districts, Said Petitioning Districts Are Still Liable as Correctly Held by the District Court.*

"In action to enjoin alleged tortious misconduct of officials of government railroad in interfering with plaintiff's business of lightering ships by pre-

venting plaintiffs from using a dock necessary to that business the government was not an 'indispensable party,' even though action involved question as to whether the United States or City owned dock, since the action could conclude nothing against the United States."

Berger v. Ohlson, 120 F. 2d 56 (9th Cir. 1941).

It is therefore submitted that under no possible theory should the petitioning districts be dismissed from this action and that on this ground alone the Petition for Writ of Certiorari should be denied.

(c) The Riparian Water Rights of Respondents Are Not Easements as Erroneously Claimed by Petitioning Districts.

In California the overlying percolating rights of the City of Fresno and the riparian water rights of respondent farmers along the San Joaquin River below Friant Dam are not easements as erroneously claimed by counsel for petitioning districts.

"The right of a riparian proprietor to the flow of water through his land is inseparably annexed to the soil, not as an easement or appurtenance, but as part or parcel of the land itself, * * *."

51 Cal. Jur. 2d 543.

(d) The Cases Cited by Petitioning Districts Are Not in Point.

Riparian right is not an easement. The cases of *Griggs v. Allegheny County*, 369 U. S. 84 (1962), 82 S. Ct. 588, and *United States v. Causby*, 328 U. S. 256 (1946), 68 S. Ct. 1062, cited by petitioning dis-

tricts have to do with alleged taking of easements to the right of air and light over land by flying airplanes and are therefore not in point. As shown respondents' riparian water rights were not easements and the taking of their water was the actual taking of real property and not the taking of an easement. For the same reason *Portsmouth Co. v. United States*, 260 U. S. 327 (1922), 43 S. Ct. 135, which had to do with an alleged taking of an easement to fire cannon shells over a person's land is also not in point. Moreover, in the *Griggs, Causby* and *Portsmouth* cases Congress had specifically authorized the use of and taking of an easement over the lands in question—which Congressional authorization as will now be shown was completely lacking in this case.

The case of *Hurley v. Kincaid* cited by opposing counsel is also not in point. The *Hurley* case was not a suit to enjoin the illegal diversion of water, but only to enjoin the actions of government agents until appellees received damages.

> "* * * the illegality, on complainants' own contention, is confined to the failure to compensate him for the taking. * * *."
>
> *Hurley v. Kincaid*, 283 U. S. 95, 104, 52 S. Ct. 267, 269 (1932).

Here respondents want water and an injunction to obtain it. They do not want damages.

Neither are other decisions cited by opposing counsel in point.

(e) There Has Never Been a Taking by Eminent Domain or Otherwise of Respondent Farmers' Riparian Water nor a Taking of the Overlying Percolating Water Rights of the City of Fresno as Erroneously Claimed by Petitioning Irrigation Districts.

In California riparian water rights, *i.e.* the right of an abutting landowner to take water directly from the stream, and overlying percolating water rights, *i.e.* the right of an overlying landowner to pump water from the underground percolating water stratas fed by seepage and percolation from the stream, are considered analogous and identical. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal. 2d 489 (1945), 45 P. 2d 972.) The Court below sustained the finding of the District Court that the abutting landowners along the San Joaquin River between Friant Dam and Gravelly Ford Canal, which is located 38 miles down stream from Friant Dam, had riparian rights and that the City of Fresno likewise had riparian percolating water rights to pump waters from the underground percolating water stratas below the City of Fresno which the Court below found was supplied by percolation from the San Joaquin River throughout a large area of the City of Fresno. For this reason we will discuss the riparian water rights of respondent farmers along the San Joaquin River below Friant Dam and the percolating water rights of the City of Fresno at the same time.

As will now be shown by the following discussion, at no time was there any claim made that the riparian

rights of the farmers nor the percolating water rights of the City of Fresno were being taken, except the claim presently being made by opposing counsel in their briefs.

We will now show (1) that the Bureau of Reclamation officials continually represented to Congress there would not be such a taking; (2) that the Bureau of Reclamation officials in all of their statements to the respondent farmers and the public generally said they did not intend to take their water rights; (3) that the lands of respondent farmers and the City of Fresno are located in the watershed and county of origin of the San Joaquin River and that Congress by statute specifically required that the Bureau of Reclamation should not take any water needed by the farmers and City of Fresno in the county and watersheds of origin of the waters of the San Joaquin River; (4) that the decisions of all courts and of this Court have held that the Bureau of Reclamation officials were not authorized to take any of the respondent farmers', City of Fresno's or Tranquillity Irrigation District's water rights; and (5) that since Congress had not authorized the taking of any water rights of respondents under the decisions of this Court there had been, nor could there be, any taking by eminent domain or condemnation of any of the water rights of respondents, including those of the City of Fresno or Tranquillity Irrigation District. We will now discuss these points in the order named.

(i) *The Bureau of Reclamation Officials Continually Represented to Congress That They Were Not Taking the Riparian Water Rights of Respondent Farmers, All of Whose Lands Lie Along the San Joaquin River Between Friant Dam and Gravelly Ford Canal, Which Canal Is Located Just Upstream From Mendota Pool.*

"Finally, in order to determine from the above a definite figure for the project irrigation supply in the southern San Joaquin Valley, consideration must be given to the water commitments downstream on the San Joaquin River, and to evaporation and seepage losses.

"There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool, water needed for preservation of fish life and waterfowl, and losses from evaporation and seepage in the reservoirs and canals, *it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements.*" (Emphasis ours.)

R 2284, Plaintiffs' Exhibit 121, Page 708 of Hearings on Senate Bill S 912, 80th Congress, 1st Session, Hearings before a subcommittee of the Committee on Public Lands United States Senate

(ii) *The Bureau of Reclamation Officials Continuously Represented Publicly and to the Respondent Farmers and to the City of Fresno That They Were Not Taking the Riparian Rights of Either the Farmers or the Riparian Percolating Water Rights of the City of Fresno.*

The Bureau of Reclamation officials continuously and publicly represented that none of the water rights of respondents would be taken. The evidence on this point was uncontradicted at the trial.

> "Kelly and Webb declared they are positive no such situation will arise; that the Central Valleys Project will be completed as a whole; *that no present owner of water rights in the San Joaquin will be deprived of any water* and that the California Water Authority will guard zealously the rights of all property owners." (Emphasis ours.)
>
> Excerpt from article from Fresno Bee dated February 5, 1937, Plaintiffs' Exhibit 161.

> "Q. (By Mr. Rowe): Prior to the construction of Friant Dam, did you attend any meetings with some of the irrigation districts in the south part of the valley, and state officials and Bureau of Reclamation officials? A. Yes, a good many meetings. * * *.
>
> The Witness: Well at Sacramento we met with Mr. Young. Hyatt was for the State, Van Etten and Edmundson, Mr. Kelly was the Department of Public Works, I believe, and Webb was the Attorney General at the time, U. S. Webb, I believe it was.
>
> * * *.

Q. Well, what did Mr. Young and Mr. Kelly tell you?

* * *.

The Witness: We were told we would have a large flow of well-regulated water; that the Government wouldn't take something away from one farmer and give it to another; and they told us always they were taking nothing but the overflow flood water, and we had the best water rights in the country, and they would protect them."

Appellees' Witness J. E. Cobb, Rep. Tr., 6/18/52, pages 6630 to 6632.

(iii) *All Lands of the Respondent Farmers and of the City of Fresno Are Located in the County of Origin and Watershed of the San Joaquin River. Congress Specifically Required the Bureau Officials to Protect and Recognize the County of Origin and Watershed of Origin Rights of Respondents Including Those of the City of Fresno and to Protect Other Vested Water Rights Recognized by State Law. Congress Has Specifically Prohibited the Bureau of Reclamation From Interfering With Vested Rights to Water Recognized by California and Particularly With the Water Rights of California Counties of Origin.*

We quote from two among many acts of Congress recognizing respondents' water rights.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *

"* * * The Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (Emphasis ours.).

63 Stat. 852, 853 (1949).

"Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereunder and the Secretary of the Interior in carrying out the provisions of this Act shall proceed in conformity with such laws."

Act of June 17, 1902 (32 Stat. at L. 388, Chapter 1093) (43 U. S. C. 391.)

(iv) *The Courts Have Also Consistently Held That the Central Valley Project as Authorized by Congress Did Not Contemplate the Taking of the Riparian and Percolating Water Rights of Respondents Including the City of Fresno Between Pine Flat Dam and Gravelly Ford Canal.*

The decisions of all federal courts have specifically recognized respondents' water rights.

"9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originat-

ing above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford;* * * *" (Emphasis ours.)

Wolfsen v. United States, 162 Fed. Supp. 403 at 411 (1958).

"Moreover, Congress and the water users have been advised that, in prosecution of the work, *existing water rights would be respected.* * * *" (Emphasis ours.)

United States v. Gerlach Live Stock Co., 339 U. S. 725 at 740, 70 S. Ct. 955 at 963 to 964, 94 L. Ed. 1232 (1950).

"* * * The conclusion *may be* justified that the report indicated an intention to take all the water below Mendota and replace it with other water. *This court can see no justification for the conclusion* that Congress, in making appropriations on the basis of the feasibility report indicated an intention to take the water rights of the plaintiffs' lands above Mendota." (Emphasis ours.)

Rank v. Krug, 90 Fed. Supp. 773, 792.

The Supreme Court in the *Gerlach* case itself approved the above statement when, after reviewing the decision of the lower Court in *Rank v. Krug*, it stated as follows:

"Footnote 22: United States District Court, Southern District of California rendered a decision on April 12, 1950, in *Rank v. Krug*, 90 F. Supp.

773, consistent with the views we take of the issues here involves." (Emphasis ours.)

United States v. Gerlach Live Stock Co., 339 U. S. 725 at 754, footnote 22, 70 S. Ct. 955 at 970, 94 L. Ed. 1231 (1950).

(v) *Since Congress Did Not Authorize a Taking of Respondents' Water Rights Including Those of the City of Fresno and Tranquillity Irrigation District There Has and Could Not Have Been a Taking of These Rights of Respondents by Eminent Domain or Otherwise.*

It is fundamental that the attempted taking of private property for public use by an officer of the United States, either unauthorized by an act of Congress or in violation of an act of Congress *is not an action of the United States and does not constitute seizure either under eminent domain or condemnation.*

"The taking of private property for public use by an officer of the United States, unless authorized, expressly or by necessary implication to do so by some Act of Congress, is not act of Government." (Syllabus.)

Youngstown Sheet & Tube Co. v. Sawyer, 103 Fed. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

"Seizure by Secretary of Commerce of plants of steel companies involved in labor dispute being unauthorized by law, there could be no recovery by suit in Court of Claims for damages under implied contract; and there could likewise be no recov-

ery under Federal Tort Claims Act, 28 U. S. C. A. Sec. 1346b." (Syllabus.)

Youngstown Sheet & Tube Co. v. Sawyer, 103 Fed. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

"* * * the Supreme Court has held on many occasions that officers of the Executive Branch of the Government may be enjoined when their conduct is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment. Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628; Land v. Dollar, 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209; Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570; United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171. There is no doubt, therefore, that the defendant is subject to an injunction, and the President not only is not a party but he is not an indispensable party to this action, as held in Williams v. Fanning, 332 U. S. 490, 68 S. Ct. 188, 92 L. Ed. 95; Hynes v. Grimes Packing Co., 337 U. S. 86, 69 S. Ct. 968, 93 L. Ed. 1231."

Youngstown Sheet & Tube Co. v. Sawyer, 103 Fed. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

V.
CONCLUSION.

It is submitted that the petitioning districts have no right to be dismissed from this action at this time since they claim in the pleadings and throughout the trial claimed that they were the beneficiaries or real owners of the water rights of respondents and of all of the waters of the Central Valley Project.

The petitioning districts also took the major portion of the Court's time during the eighteen-month trial in cross-examining respondents' witnesses and in producing their own evidence. They also, with one exception, failed to set forth their right to dismissal as a point on appeal as required by the Federal Rules of Civil Procedure and the decisions of this Court. The petitioning districts also "clearly had an interest in the controversy" within the meaning of the latest statutes of the State of California hereinbefore quoted and "clearly promoted, encouraged, advised, conspired, aided, assisted and abetted" the Bureau officials in taking the water of respondents.

Petitioning districts therefore do not state grounds for a writ of certiorari on the basis that they should now be dismissed from this action. Petitioning districts do not in reality set up any point or any grounds for granting the petition, apparently being interested primarily in getting out of the case at this stage of the proceedings, with one exception, a short argument on the alleged taking of respondents' rights by eminent domain,

they merely "incorporate by reference" the position of the Attorney General and rely upon his grounds of appeal. They are therefore giving this Court no material assistance on the complex questions of law.

It is therefore respectfully submitted that the petition of the districts for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 8, 1962.